INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	4
Statement	4
Argument	8
Conclusion	17
Appendix	18

CITATIONS

Cases:	
Bilokumsky v. *Tod*, 263 U. S. 149	16
Bowles v. *American Brewery Inc.*, 146 F. 2d 842	11
Bowles v. *Leithold* (C. C. A. 3), not yet reported, certiorari denied, March 25, 1946, No. 826, present Term	10
Bowles v. *May Hardwood Co.*, 40 F. 2d 914	10
Bowles v. *Montgomery Ward & Co.*, 143 F. 2d 38	10
Bowles v. *Seminole Rock & Sand Co.*, 325 U. S. 410	11
Bowles v. *Willingham*, 321 U. S. 503	11
Buckley, Dement & Co. v. *Bowles*, 143 Fed. 877	11
Carothers v. *Bowles*, 148 F. 2d 554, certiorari denied, 325 U. S. 875	7, 11
Case v. *Bowles*, No. 261, present Term	11
Collins v. *Porter*, No. 393, present Term	17
Gold-Form, Inc. v. *Bowles*, 152 F. 2d 107	11
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208	16
Labor Board v. *Express Publishing Co.*, 312 U. S. 426	9
Lockerty v. *Phillips*, 319 U. S. 182	11
Rosenweig v. *United States*, 144 F. 2d 30, certiorari denied, 323 U. S. 764	11
Saunders Petroleum Co. v. *Bowles*, 152 F. 2d 112	11
United States v. *Hark*, 320 U. S. 531	14
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290	13
Walling v. *Reuter Co.*, 321 U. S. 671	13

694386—46——1

Statutes: Page

Emergency Price Control Act of 1942 (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. IV, 901 et seq.)

Section 2 ..... 18, 20
4 (a) 16, 21
202 (a) 21
(b) 21
(c) 22
(g) 22
204 (d) 22
205 (a) 16, 23

Regulations:

Maximum Price Regulation 165, as amended—Services (7 F. R. 6428):

Section 1499.101 24
Section 1499.102 (a) 15, 25
(b) 15, 26
(c) 14, 26
(d) 12

Revised Maximum Price Regulation 165—Services (9 F. R. 7439, 11,173)

Section 1 ..... 12, 29
4 29
5 30

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1090

D. M. CAROTHERS, DOING BUSINESS AS ALLRIGHT AUTO PARK, ET AL., PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, AND PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, SUCCESSOR IN OFFICE TO CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on the preliminary injunction (R. 26–33) and its findings of fact and conclusions of law on the final injunction (R. 40–46), are not reported. The opinion of the circuit court of appeals (R. 57–63) is reported at 152 F. 2d 603.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 13, 1945 (R. 63–64), and the petition for rehearing was denied January 10, 1946 (R. 84). The petition for a writ of certiorari was filed on April 9, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the injunctive relief which the court below decided the trial court should have granted is unreasonably broad in scope because it restrains petitioner Carothers individually and the members of the partnership from violating the provisions of Maximum Price Regulation No. 165 at all of the parking lots operated by him or them, respectively, at the time of the trial or at any time thereafter.

2. Whether the court below erred in directing the trial court to enjoin petitioner Carothers individually from violating the provisions of Maximum Price Regulation No. 165 at the parking lots operated by him where no violations of the regulation had occurred, as well as at the parking lot operated by him and the other members of the partnership where violations of the regulation were admittedly taking place at the time of the trial.

3. Whether the district court, the circuit court of appeals, and this Court have jurisdiction in this proceeding to consider and determine the validity of price regulations and individual orders promulgated by the Price Administrator.

4. Whether Revised Maximum Price Regulation No. 165 of July 1, 1944, may be properly construed to except automobile storage services from its effective operation and to place the control of such services within the scope of the General Maximum Price Regulation.

5. Whether the court below erred in declining to dismiss the appeal with respect to the members of the partnership on the ground that the case had become moot as to them, the partnership having ceased to operate its parking lot in Dallas, Texas, during the time the appeal was pending.

6. Whether the injunction which was granted by the district court requiring petitioner Carothers to file, under Section 1499.102 (c) of Maximum Price Regulation No. 165, a list of prices with respect to the eight parking lots in Houston, is invalid on the grounds: (a) that Section 1499.102 (c) had been revoked prior to the trial; (b) that Section 1499.102 (c) was not shown to be applicable to petitioner Carothers' parking services; and (c) that Section 205 (a) of the Emergency Price Control Act does not authorize the issuance of a mandatory injunction directing the filing of a price report.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the applicable regulation are set forth in the Appendix, *infra*.

STATEMENT

This suit was instituted by the Price Administrator against all of the petitioners as co-partners and against petitioner Carothers individually, seeking to have them enjoined from violating the provisions of Maximum Price Regulation No. 165 in connection with the operation of their automobile parking lots situated in Dallas and Houston, Texas, and seeking a mandatory injunction requiring petitioner Carothers to file under Section 1499.102 (c) of that Regulation a list of prices in connection with the parking lots operated by him individually in Houston (R. 6–14).

Petitioners as co-partners operated one parking lot in Dallas, Texas, and petitioner Carothers operated individually eighteen such lots in Houston. The services rendered at these parking lots were of a special type, known as the "park and lock" plan. Under this plan each parking area is subdivided into spaces, each large enough to hold one car. The customer drives his car into one of the spaces, locks it, and retains the key, the car remaining there until reclaimed by the customer. There is a part-time cashier at each

parking lot, but no car attendant or watchman is present. The customer pays the cashier, or, in the cashier's absence, deposits the amount due in an envelope provided for the purpose, and drops the envelope in a locked receptacle. (R. 58.)

The parking lots involved may be divided into three groups:

(1) A single parking lot at Dallas, Texas, was operated by a partnership consisting of Carothers and the three other petitioners. Application was made to the District Director of the Office of Price Administration for a maximum price applicable to the services rendered at this lot, and from his determination an appeal was taken to the Price Administrator, who, on May 31, 1944, increased these prices. At the time of trial, these protest proceedings had been re-opened for the submission of further evidence. It was stipulated, and the district court found, that the prices established by the Price Administrator were being violated at the time of the trial. (R. 36, 43–44.) The partnership ceased operating this parking lot while the appeal from the judgment of the district court was pending.

(2) Ten parking lots in Houston, Texas, were operated by petitioner Carothers individually. As to these lots, pursuant to the preliminary injunction granted by the district court in the present case (R. 32), petitioner filed a report of his maximum prices as computed under Section

1499.102 (c) of Maximum Price Regulation No. 165. These prices were reduced by the Acting District Director (R. 15–17). It was stipulated, and the district court found, that petitioner Carothers was then abiding by this reduction order but that he intended to file an appeal with the Price Administrator concerning it. (R. 36, 43.)

(3) Eight other lots in Houston, Texas, were operated by petitioner Carothers, and it was stipulated, and the district court found, that petitioner had failed to file his computation of prices with respect to them under Section 1499.102 (c) of the Regulation (R. 35–37, 44–45).

The district court ordered the filing of prices with respect to the group of eight lots, but denied the other injunctive relief requested because the reopened protest proceedings were pending in the case of the Dallas lot and because petitioner Carothers intended to file an appeal with the Administrator in the case of the ten parking lots in Houston.

The circuit court of appeals affirmed the decision of the district court granting the mandatory injunction with respect to the eight parking lots in Houston, and reversed the decision of that court denying the other injunctive relief requested by the Administrator. The circuit court of appeals held that the denial of an injunction under

Section 205 (a) of the Emergency Price Control Act on the ground that the price regulation or order involved was invalid, or on the ground that a protest proceeding to test the validity of the regulation or order was pending, was inconsistent with the provisions of the Emergency Price Control Act and the policy of the Congress in enacting it; that the case had not become moot as to the members of the partnership because they had ceased operating the Dallas lot while the appeal was pending; that the past conduct of the petitioners showed that they were "not only engaged in violating [the Administrator's] orders, but were of one mind in their intent to continue such violation," which made future violations reasonably probable (R. 62); and that whether the petitioner's business was within the scope of, and subject to regulation under the Emergency Price Control Act was a question concerning the validity of the price regulation involved, which only the Emergency Court of Appeals could consider (R. 60). Subsequent to the trial but prior to the judgment of the court below, the Emergency Court of Appeals in the case of *Carothers* v. *Bowles,* 148 F. 2d 554, certiorari denied, 325 U. S. 875, sustained the validity of Maximum Price Regulation No. 165 as applied to the parking lot operated by the partnership in Dallas, Texas.

694386—46——2

ARGUMENT

I

In the circumstances of this case, the injunctive relief which the circuit court below decided should have been granted was not unreasonably broad in its geographical reach. The past conduct of petitioner Carothers and his partners at the Dallas lot was one of flagrant noncompliance, and this conduct was continued even while the case was being tried (R. 36; 43–44). Petitioner Carothers' failure to file prices as to the eight Houston lots (R. 37, 45) showed a like obstinate disinclination on his part to comply with the regulation.[1] As the court below well stated, "it is the conduct of the defendants, and not the locale of their conduct, which is important." (R. 63.) If a defendant's conduct is such as to make the occurrence of future violations likely, unless the injunction be issued, it is clearly proper that the restraint should be operative at whatever geographical location the defendant may exercise control over a business. An injunction limited in its operation to one business location or to one city might be rendered completely nugatory by the simple device of shifting the place of business.

[1] These circumstances and the fact that petitioner expected to contest the order applicable to eight of the Houston lots rightly made the court below conclude that the stipulated compliance at the other ten Houston lots was "not an earnest or willing compliance", and hence not likely to continue.

Accordingly, it was not improper to grant the requested relief against violations at any of the parking lots which were then operated or which might thereafter be operated by petitioners. Hence, there was no need of showing, as petitioners contend (Br., p. 8), that violations had occurred at the ten Houston lots in order to obtain injunctive relief against violations at those lots.

Further, the injunctive relief which the court below decided should be granted was not too broad with respect to the nature of the violations restrained. Petitioners assert (Br., p. 7) that the injunction here was "in the very broadest of terms", and they invoke the principle that the decree may restrain the defendant from further like violations of the Act, but "should not enjoin in general terms violations of the Act in the future in any particular." The general rule announced by this Court is that the breadth of injunctive relief to be granted must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to the unlawful acts found to have been committed in the past. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437. In the case at bar flagrant violations of both the price control and report filing provisions of Maximum Price Regulation No. 165 had occurred, and they are the only substantive provisions contained in that regulation. Consequently, the violations

against which the injunction involved here can operate in the future can only be violations identical with, or similar to, those which had occurred prior to the trial. And there was ample justification for the conclusion that future violations might reasonably be anticipated from the course of petitioners' conduct in the past. Injunctions as broad as, or broader than the injunction granted herein, have been granted under the Price Control Act, and have been upheld. *Bowles* v. *Montgomery Ward & Co.,* 143 F. 2d 38 (C. C. A. 7); *Bowles* v. *May Hardwood Co.,* 140 F. 2d 914 (C. C. A. 6); *Bowles* v. *Leithold* (C. C. A. 3), not yet reported, certiorari denied March 25, 1946, No. 826 at the present Term.

II

Petitioners assert that the Price Administrator has no authority under the Emergency Price Control Act to regulate prices charged for parking in lots operated on the "park-and-lock" plan, and that Maximum Price Regulation No. 165 is invalid as applied to them. They also contend that the order fixing prices for parking in the ten lots operated by petitioner Carothers in Houston, is invalid because it is not an order of general force and effect. The court below properly held that these questions concerned the validity of the regulation and order under the statute, and that the determination of those issues was within the exclusive initial jurisdiction of the

Emergency Court of Appeals. See *Bowles* v. *Willingham,* 321 U. S. 503, 509–10, 521; *Lockerty* v. *Phillips,* 319 U. S. 182; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410; *Case* v. *Bowles, et al.,* No. 261 at the present Term, decided February 4, 1946; *Bowles* v. *American Brewery Inc.,* 146 F. 2d 842, 845 (C. C. A. 4); *Rosensweig* v. *United States,* 144 F. 2d 30, 33 (C. C. A. 9), certiorari denied, 323 U. S. 764. The Emergency Court of Appeals has, without question, exercised jurisdiction under Section 204 (d) to determine the validity of orders fixing specific prices in individual cases. *Gold-Form, Inc.* v. *Bowles,* 152 F. 2d 107; *Saunders Petroleum Co.* v. *Bowles,* 152 F. 2d 112; *Buckley, Dement & Co.* v. *Bowles,* 143 Fed. 877. And, as previously stated herein, *supra,* p. 7, the Emergency Court of Appeals has upheld the validity of Maximum Price Regulation No. 165 as applied to the parking lot operated in Dallas under the "park and lock" plan by the partnership. *Carothers* v. *Bowles,* 148 F. 2d 554, certiorari denied, 325 U. S. 875. Petitioners' vain attempt to torture the decision rendered squarely against them in that case into a ruling in their favor by lifting one sentence from the context of the opinion is obviously not faithworthy.

III

Petitioners also claim that the granting of injunctive relief against violations of Maximum Price Regulation No. 165 was improper because

the regulation of prices for storage services was transferred by Revised Maximum Price Regulation No. 165 to the General Maximum Price Regulation. It is argued (Br., p. 13) that in Revised Maximum Price Regulation 165 it was "expressly provided by Section 1 (d) (2) that storage services and services incident thereto should be excepted from 'R. M. P. R. 165, July 1, 1944' and should be governed by the 'General Maximum Price Regulation.'" This is a gross misreading of Revised Maximum Price Regulation No. 165, *infra,* pp. 29–30, which at the time the district court entered its judgment, provided in Section 1: "This regulation covers all services previously covered by Maximum Price Regulation No. 165 as amended, Services * * *." A subsequent reference to the General Maximum Price Regulation was, as indicated in the margin, merely to show that certain storage services which ***had been*** subject to the latter Regulation would continue to be subject thereto.[2]

---

[2] Section 1 of R. M. P. R. 165 provided, following the sentence above-quoted: "It also covers all other services except: * * * (d) The following services which *remain under* the General Maximum Price Regulation: (1) transportation services of contract carriers; (2) storage, warehousing and terminal services, and services incident thereto; (3) the furnishing of electricity, gas, light, heat, power or water when the furnishing thereof is not subject to the requirements set forth in paragraph (c) of Revised Supplementary Regulation No. 11, § 1499.46." [Italics supplied.]

IV

The partnership having ceased operating the parking lot in Dallas while the appeal was pending, petitioners contend that the case became moot as to the members of the partnership. The court below correctly rejected this contention. The factual situation here is somewhat analogous to that involved in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290,[3] and the case should be governed by the principles announced therein by this Court. At page 309 the Court said:

> The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. * * *
>
> * * * there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court * * *. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.

[3] Cf. *Walling* v. *Reuter Co.*, 321 U. S. 671.

V

Petitioners contend on various grounds that the mandatory injunction granted by the district court and affirmed by the court below, requiring petitioner Carothers to file a list of prices under Section 1499.102 (c) of Maximum Price Regulation No. 165, *infra*, p. 27, was improperly granted.

The contention that the revocation of Section 1499.102 (c) and the substitution of a somewhat different reporting requirement just prior to the trial, rendered the granting of the injunction improper, is without merit. The reporting by petitioner Carothers of a computation of his prices pursuant to that subsection for a period when the subsection was effective would be relevant to possible future action by the Administrator notwithstanding the revocation of the subsection prior to the making of the report. Thus, the Administrator might have need of the report when considering the advisability of bringing an action for damages based on excessive charges made during the period when the particular regulation was operative; and the regulation remains in force and effect for that purpose. See *United States* v. *Hark*, 320 U. S. 531, 536.

Petitioners' further contention that the record does not show the applicability of Section 1499.102 (c), *infra*, pp. 26–28, is equally untenable. Subsection (c) of Section 1499.102 is applicable only

if both subsections (a) and (b), *infra*, pp. 25–26, are inapplicable. If petitioner Carothers did not furnish the same or similar parking service in March, 1942, as he did under the "park and lock" plan, subsection (a) is inapplicable. The record shows that the parking service furnished by him in March, 1942, differed from the "park and lock" service furnished at the time of the trial (R. 8, 19). Thus, subsection (a) is inapplicable. If petitioner Carothers has no competitive sellers of the same class, subsection (b) is also inapplicable, and subsection (c), by its terms, becomes applicable. The record shows that a preliminary injunction was entered against him requiring him to file a report as to ten of the Houston parking lots (R. 32–33). We do not believe that it would be proper to assume that petitioner Carothers would have silently permitted the final injunction to be entered against him as to the eight lots (R. 34–46) if prices computed under either subsection (a) or (b) would have been beneficial to him, especially since the facts necessary to show the applicability of either (a) or (b) were peculiarly within his own knowledge. We believe that petitioners' contention should be resolved by the application of the principle that a defendant may not, while remaining silent as to material facts peculiarly within his own knowledge, object to the plaintiff's failure to supply that evidence. See, e. g., *Bilokumsky* v. *Tod*, 263 U. S. 149, 153–

154; *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 225–226.

Finally, the argument that Section 205 (a) of the Emergency Price Control Act does not authorize the granting of a mandatory injunction requiring the filing of a price report, upon the ground that Section 202, *infra,* pp. 21–22, provides the exclusive means of obtaining information under that Act, is without substance. Section 205 (a), *infra,* pp. 23–24, plainly authorizes the granting of a mandatory order to enforce compliance with the provisions of Section 4 (a) of the Act, *infra,* p. 21. Section 4 (a) makes it unlawful to omit to do any act in violation of any requirement or order issued under Section 202 (b). Obviously, the reporting requirements of Maximum price Regulation No. 165 are issued under Section 202 (b), *infra,* pp. 21–22. And there is nothing in the Act to indicate that it was the intention of the Congress to make the subpoena procedure provided for in Section 202 the exclusive procedure to be followed by the Administrator in obtaining information under the Act. The fact that the Congress provided two methods by which information may be obtained does not mean that one must be used to the exclusion of the other. The two modes of securing information are cumulative and not alternative. Cf. *Collins* v. *Porter,* No. 393, at the present Term, decided April 22, 1946.

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and no question of large public importance is involved. The petition should be denied.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

JOHN R. BENNEY,
Attorney.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

MILTON KLEIN,
Director, Litigation Division,

SAMUEL MERMIN,
Chief, Special Litigation Branch,
Office of Price Administration.

MAY 1946.